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The Expert Witness and the Use of Videotape Recordings

REFERENCE: Kessler, J. B., "The Expert Witness and the Use of Videotape Recordings," *Journal of Forensic Sciences*, JFSCA. Vol. 28, No. 2, April 1983, pp. 518-522.

SYNOPSIS: Juror reaction to videotape in the courtroom, and specifically to videotape's effect on witness credibility, has been explored by various communication researchers. This paper summarizes some of the research on videotape in the courtroom, discusses some of the legal issues involved, and focuses on some of the specific uses of videotape for the expert witness. The pros and cons of using videotape are also explored.

KEYWORDS: symposium, jurisprudence, video tapes, witnesses

A couple of years ago I gave a presentation to a group of communication researchers and lawyers on videotape research. At that time, videotaping was an experimental and not a widely accepted procedure for recording depositions, lineups, and taping of full trials. That particular group was interested in research methods and results. They were especially interested in how juries reacted to the use of videotape in the courtroom when the entire trial was taped or videotape was simply used for depositions. I believe that members of the American Academy of Forensic Sciences would be primarily interested in the best ways to persuade a jury, and the best ways to express expertise to assist jurors in understanding some aspects of a case. Videotape is becoming a more popular method for achieving these goals.

I would therefore like to summarize briefly some of the research on the use of videotape in the courtroom and also to summarize some legal issues involved. Finally, I would like to center on some of the specific uses of videotape for the expert witness. My interest in this area developed in the early 1970s. I was involved with research on jury decision making and created a videotape stimulus to test various factors that might affect that process. The effect of the following variables on decision making was studied: six versus twelve member juries, physical attractiveness, and litigant sex differences. I thought the area of most interest to the symposium participants would be the reactions to the use of videotape in the courtroom.

Some readers may be familiar with many advantages of using videotapes, particularly with depositions. Perhaps you have been deposed through videotape because transportation costs or time restraints prohibited your attendance at the trial. Also, if a witness was very ill the witness's deposition might have been videotaped and then played back at trial. In a recent

The opinions or assertions contained herein are the private views of the author and are not to be construed as official or reflecting the views of the American Academy of Forensic Sciences. Presented at the Symposium on Effective Expert Testimony, 33rd Annual Meeting of the American Academy of Forensic Sciences, Los Angeles, CA, 17-20 Feb. 1981. Received for publication 2 Aug. 1982; accepted for publication 9 Aug. 1982.

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court decision, *Chandler v. Florida* [1], the Supreme Court of the United States held that a state may experiment with radio, television, and still photography in the courtroom, in criminal trials in spite of the defendants' objections. This case has encouraged the use of videotape technology.

Major Studies

Juror reaction to the use of videotape and particularly how witness credibility is affected by using videotape has been explored by various communication researchers. There was a major study done at Michigan State University studying live versus videotape trials, and black and white versus color videotape trials. The Michigan State team also studied the deletion of inadmissible material in videotape trials, and the editing techniques for deleting such evidence. Detecting witness deception in videotape presentations and production techniques were also studied. This major research effort funded by the National Science Foundation has been written up in many journals [2-4].

The *Brigham Young University Law Review* Vol. 2, 1975 [5] issue included an excellent discussion of the BYU research in this area. Basically, what the Michigan State study concluded was that their findings failed to show that the use of videotape trial materials produced any negative effects on juror response [3]. I think this conclusion is very significant as far as expert witnesses are concerned. One suggestion is that the use of videotape may make something more real to jurors than just discussion or the use of photographs.

Legal Issues Involved in Using Videotape in Legal Settings

I want to touch briefly upon some of the legal issues that are involved in the use of videotape. This primarily concerns the use of videotaped depositions, lineups, and videotaping trials. One is the *right of confrontation*. Because the witness may not be present during the trial when a deposition has been videotaped, there is the question of the defendant's right to confront or cross-examine the witness. *People v. Moran* [6] concerned a challenge by the defendant of a videotape of a dying witness. However, since the defendant's attorney had cross-examined the witness at length during the videotaped deposition, the appeal court ruled that there was opportunity for confrontation. See, for example, Short et al [7] for discussion of this and the following legal issues.

More recently, an appellate court denied a defendant's plea that the defendant's counsel was not present during the videotaping of a lineup and, therefore, was denied *right of counsel*. The court stated that the defendant was probably better protected by having the videotaped record of the lineup, than if the lawyer had been present to observe the process [8]. In an earlier case [9], the court had a similar reaction to the objection that counsel should be present at a photographic lineup.

Consideration of the *right to effective assistance of counsel* brings into question the possibility of reopening examinations of a witness if the witness is no longer available, and only the videotape is available. Recently, in a tangentially related case on exclusion of hearsay evidence (not videotaped) because of a lack of opportunity for challenges by cross-examination, the court found that the problems with hearsay testimony may be overcome by the requirement that the statements be necessary and trustworthy [10]. This may relate to the challenge on the use of videotape. If the videotape testimony is necessary and trustworthy this may override the impossibility of reopening cross-examination.

Videotape may actually enhance one's rights. One court decision found that videotape did not hurt one's *privilege against self-incrimination*, because the tape provided a record of how a confession was taken. Any coercion could be better seen, reasoned the court, on the tape playback than by simply reading the transcript [11].

In the early 1960s an appeal court required written transcripts of audiotapes played to a

jury [12,13]. However, more recent opinions state that the tape need not be recorded into the written transcript because the appellate court could listen to the tape if necessary. One recent court decision stated:

In fact, sometimes the appellate court considers the tape recording to be a better record of what occurred at trial than the reporter's transcript of the tape played to the jury [14].

A tape recording may serve as a more specific record than the transcript as more clues are available for analysis.

The possibility that information may become distorted through the use of videotape brings up the issue of *right to due process*. In *People v. Moran* [6] the court held that the videotape medium's possible "filtering" effect would filter on both sides of the case and, therefore, not be unfair. Further, videotape was stated to be "...sufficiently similar to live testimony to permit the jury to properly perform its function" [6]. However, the validity of the videotaped representation must be proven. In one case a videotaped interview between a plaintiff and his attorney done without the knowledge of the defense counsel showed the plaintiff to be in a partially catatonic state. It was found not to be admissible as evidence of the plaintiff's state because the plaintiff physician stated it was not a fair representation. However, the court stated that the tape was neither inflammatory nor prejudicial to the jury [15]. Thus, care must be taken to insure that the videotaped evidence is representative of what is claimed and is done in a proper manner. Generally, the courts have been favorable to the use of videotaping and the process has not been viewed as an infringement of one's rights.

The Expert Witness's Use of Videotape

Real or demonstrative evidence represents an attempt to supplement the witnesses' descriptions of things with actual portrayals of the subject matter. Videotape is considered real or demonstrative evidence and should be considered for use by expert witnesses.

In the expert witness's presentation one needs to clarify for the jurors the basic statements you are trying to communicate. Some of these statements tend to be very complicated, and although there may be a very careful and competent explanation, the use of additional techniques tends to enhance credibility and clarity.

Videotape has been used by expert witnesses to depict a day in the life of paraplegics, to show the difficulty of handling such simple tasks as bodily elimination. Simply describing the problem would not be as descriptive as a videotape portrayal. In another example related to me by a lawyer, a wing fell off of an airplane and was found three miles away. The problem here was to show that the wing of the plane's structure was of sound design, and to demonstrate the relationship between that and the accident. What the lawyer did with the videotape in this situation, working with the expert witness and the videotape expert, was to show at various times and from various camera angles that the person flying the plane had to be exceeding the indicated structural possibilities for this airplane. Those who are experts in this technical area will understand that even more fully than I do, but from a juror's point of view it meant that they could see what had to happen in order for the wing to fall off.

An accident liability trial provides another example of the use of videotape. A man fell off a four-wheel ladder. It was a three-step ladder, and the problem was to show whether the retractable wheels of the ladder were a defect in design. The expert witness discovered that when the ladder was pulled toward the person and then pushed away, the back wheels lined up and the ladder wheels did not retract fast enough as the ladder moved. What the videotape technician decided in talking with both the lawyer and the expert witness was that they needed to use a stuntman. The warning here is that taped evidence must not look too theatrical. Audiovisual techniques have generally not been allowed in court for this very reason.

Pros and Cons of Videotape

What are the problems and the benefits in using videotape techniques? One problem is that care must be taken to guard against a "blood-and-guts" presentation. Some courts have not allowed the use of certain videotaping because of its sensationalism. This could occur in the "day in the life of" videotapes if discretion is not used. For instance, as mentioned above, it could be unpleasant to watch someone performing bathroom functions, and there are ways of videotaping this process so that it is not offensive. One final consideration is that the videotape must not perplex the jury. The objective is that it assist rather than confuse the jurors.

Basically, then, my major premise has been that the use of videotape may be an effective and beneficial way of enhancing credibility and clarifying issues. There are many examples of its successful use. The things that I have suggested may be done in many cases without great expense. Admittedly it is a controversial technique, but I would suggest that the expert witness discuss the use of videotape with the attorney involved in the case. A videotape expert might also be consulted. The expert witness seeks to clarify issues for the jury and videotape may assist in this effort.

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